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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CONCEPT CHASER CO., INC., Plaintiff and Respondent, v. PENTEL OF AMERICA, LTD., Defendant and Appellant.	B241929 and B243330 (Los Angeles County Super. Ct. No. BC429108)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed in part, reversed in part, and remanded.

Perkins Coie (Los Angeles) and Donald J. Kula; Perkins Coie (Palo Alto), Timothy L. Alger and Sunita Bali for Defendant and Appellant.

The Ehrlich Law Firm and Jeffrey Isaac Ehrlich for Plaintiff and Respondent.

Pentel of America, LTD (Pentel America) appeals from the judgment entered following a jury trial that resulted in a verdict of $14.625 million, as breach of contract damages, for unauthorized usage of Concept Chaser Co., Inc. (Concept)'s advertising idea.[1] It also appeals from the post-judgment attorney fee award of $1,512,999. Both appeals have been consolidated for disposition.

Pentel America contends the judgment must be reversed, because Concept's breach of contract claim is preempted by federal copyright law; Concept failed to prove mutual assent; and it was prejudiced by the admission of evidence of a comment about "an Asian woman." It challenges the award of damages as an illegal penalty rather than an enforceable liquidated damages provision. Alternatively, Pentel America contends the $14.625 million damage award must be reduced to $10,000, because the contract clearly provided for $10,000 as damages for its single "usage" of Concept's idea. It contends the trial court committed reversible error in admitting expert evidence regarding the meaning of the word "usage," which led to the jury's adoption of an unsupportable "usage" definition; in instructing the jury to determine the "actual" amount of damages rather than directing the jury the amount of damages was $10,000; and, on the issue of damages, in denying its judgment notwithstanding the verdict (JNOV) motion and motion for a new trial or, alternatively, to reduce the award to $10,000.

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1 The amended notice of appeal reflects Pentel America also purports to appeal from the initial judgment, the order on its motion for judgment notwithstanding the verdict, the judgment, as amended following the partial grant of its motion for judgment notwithstanding the verdict, and a nonexistent "amended/corrected" judgment. The parties have filed supplemental briefs regarding whether these matters are appealable. The order on the motion for judgment notwithstanding the judgment is not appealable. (*Cobb. v. University of So. California* (1995) 32 Cal.App.4th 798, 804 [order granting in part judgment notwithstanding the verdict not appealable]; cf. Code Civ. Proc. § 904.1, subd. (a)(4) [order denying judgment notwithstanding the verdict appealable].) The initial judgment and amended judgment were vacated and have been superseded by the final judgment on appeal. We therefore dismiss the purported appeals from the initial judgment, the order on the motion for judgment notwithstanding the verdict, the amended judgment, and the nonexistent "amended/corrected" judgment.

Pentel America challenges the propriety of the award of attorney fees to Concept in the amount of $1,512,999 ($1.5 million) on the ground this award improperly includes fees expended to prosecute Concept's abandoned fraud claim and its claims against other defendants dismissed prior to trial. It also contends the amount awarded is unsupported by the billing records of Concept's counsel, which are vague and belatedly created.

We reverse the judgment as to damages only and reverse the post-judgment attorney fee award.[2] We remand for a new trial on the issue of actual damages sustained by Concept for Pentel America's breach of contract in making unauthorized usage of Concept's advertising idea and direct the trial court to enter a new attorney fee award order in light of the totality of the circumstances resulting in the final judgment.

The Copyright Act (17 U.S.C.A. § 101 et seq.) is factually inapplicable. Rather, Concept's advertising idea is a creature of contract subject to state protection pursuant to the principles enunciated in *Desny v. Wilder* (1956) 46 Cal.2d 715 (*Desny*). Evidence regarding the "Asian woman" comment was nonprejudicial in light of overwhelming evidence that Pentel America misappropriated Concept's idea for its own benefit. The court did not abuse its discretion in allowing expert evidence on what "usage" in Paragraph 3 meant, and substantial evidence supports the jury's determination of that meaning. The record supports the existence of mutual assent regarding the scope of the advertising idea Concept was to provide Pentel America.

In contrast, as a matter of law, no mutual assent existed regarding the provision in Paragraph 3 of the contract, which provides in pertinent part: "[E]ach unauthorized usage [of Concept's idea] shall be a minimum of $10,000." The term "minimum of $10,000" is nowhere defined or described in the contract itself. The parties to the contract were left without any exact amount or formula that would enable them to know with reasonable certainty how much Pentel America would be liable for each unauthorized use of Concept's idea. Accordingly, the trial court therefore erred in finding this provision was

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2 Concept's motion to strike portions of Pentel America's reply brief is denied.

an enforceable liquidated damages provision. The judgment must be reversed and remanded for a new trial on actual damages, because the award of the jury was based on this unenforceable damages provision.

Additionally, the award of attorney fees is premature in view of this remand for a new trial on damages. We therefore reverse the post-judgment order awarding attorney fees and direct the trial, on remand, to vacate the award and, following entry of the new judgment, make a new single award in light of the totality of the circumstances.

BACKGROUND

1. *Factual*

Pentel Co., Ltd., located in Japan (Pentel Japan), was one of the largest writing instrument manufacturers in the world and the parent of Pentel America. "HyperG" was its new gel roller pen, and its principal features were its "Super Smoothness," its "archival-quality," its "waterproof" property, and its "quick-drying" ink.

Concept was a small advertising agency. Yoshi Hayakawa, its President, worked with his wife, Clara Goh. On November 18, 2007, Isseki Nakayama, President of Pentel America, sent an e-mail to Hayakawa requesting they meet "as soon as possible" to discuss "an urgent project."

On November 21, 2007, the two met at Pentel America's headquarters. Nakayama explained Pentel Japan refused to approve Pentel America's existing marketing strategy for the HyperG and requested Hayakawa to "come up with [Concept's] best idea to promote" the HyperG pen.

At this meeting, Hayakawa presented Nakayama with Concept's "Terms of Business" document, which was a one page contract reflecting the standard arrangement among advertising agencies and their clients for at least 20 years. Concept would present Pentel America with its ideas but the latter could not use the ideas unless it hired Concept through another agreement. In the offered contract, Concept was identified as the "Agency" and Pentel America as the "Client." The contract provided for "a minimum charge of $5,000 for each proposal, which will be waived if Client agrees to execute the proposal."

Paragraph 3 of the contract provided: "RIGHTS AND OWNERSHIP OF INTELLECTUAL PROPERTY: Unless expressly provided in a separate written agreement, Agency is the owner of all intellectual property created under this agreement – whether preliminary or final – including copyrights, writings, information, inventions, trade secrets, works of authorship or improvements thereof. The penalty for each unauthorized usage shall be a minimum of $10,000. If court action is necessary, user will also be responsible for reasonable attorney and court fees. Works created for Client: If Client is interested in using any work of [Agency] created for Client in a different/new project/s, [Agency] is open for fair trades and proposals."

This contract was identical to the contract entered into between Concept and Pentel America in 2004, except the 2007 version increased the proposal, i.e., presentation, fee from $2,500 to $5,000. In 2004, Pentel America paid Concept to make a presentation for its Impulse pen but did not hire Concept, because it did not like Concept's idea. At that time, Hayakawa had explained to Nakayama the 2004 one-page contract, including the provision for payment of $10,000 for each unauthorized usage of Concept's ideas.

At this meeting, Hayakawa handed Nakayama the 2008 "Terms of Business" document and again reviewed the contract terms with Nakayama. He explained that although Concept's present standard contract provided for a $30,000 unauthorized use charge, which was based on the increased value of its intellectual property over the three year period, he had inserted the $10,000 unauthorized use charge from their 2004 contract in its place as a gesture of goodwill and to express his gratitude to Nakayama for giving Concept another chance. When Hayakawa jokingly begged Pentel America not to take advantage of his kindness by stealing Concept's brainchildren, Nakayama laughed and assured him that Pentel America would never think of doing so. Nakayama requested Concept develop its plan "as soon as possible," because Pentel America needed to proceed with its HyperG launch.

Over the ensuing two weeks, Goh and Hayakawa worked virtually nonstop to develop the perfect pitch for the nationwide campaign, because Goh believed a successful project with an international brand like Pentel America would allow Concept to attract top-notch Japanese clients and grow into a big advertising agency. Pentel's then existing marketing strategy targeted business professionals by emphasizing the HyperG's physical features. Goh concluded this strategy would fail, because professionals such as lawyers and doctors were too busy to care about a $2 pen. She believed the proper focus, instead, was on college students and that Pentel should launch an "interactive campaign" to attract students and involve them in the HyperG campaign, because such students would ignore traditional advertising.

Goh then came up with the idea of the "smoothest line" contest, which involved a campaign inviting college students to submit their best pickup lines for a chance to win prizes. In light of their combined 46 years of advertising experience, Goh and Hayakawa recognized this idea could transform their small agency into a major agency.

On December 4, 2007, Hayakawa phoned Nakayama and informed him that Concept had developed a better idea than marketing HyperG to professionals. Nakayama invited him to make a presentation in Japanese to him and to Hirokazu Nakajima, Pentel America's Vice President, the next day at Pentel America's headquarters.

On December 5, 2007, Hayakawa put on a power point presentation of Concept's HyperG proposal for college students, which contained this admonition: "Professionals like Doctors, Attorneys and CPAs DO NOT care much about $2-3 pens. To them they are all alike." Goh "highly recommended" targeting college students. The ad campaign would "encourage them to compete in a challenge of who can come up with the 'smoothest line' to win attractive prizes." Among the visualizations of potential ads, one asked "Do you have a map? 'Cause Honey, I just keep getting lost in your eyes" and invited readers to "come up with a better line to win prizes!"

Nakayama interrupted Hayakawa's slide presentation and commented HyperG would be wasted on the college market. Hayakawa asked him to reserve judgment until after the entire presentation. Once he explained the "smoothest line" contest, both Nakayama and Nakajima began smiling. At its conclusion, Nakayama praised the idea's originality and stated Pentel America never had tried anything like it before. He invited

Hayakawa to return in two days and make the presentation to Pentel America's English-speaking staff.

On December 7, 2007, Goh, who had accompanied Hayakawa, pitched the smoothest line context in English to Nakayama, Nakajima, Peter Katz, Pentel America's Marketing Director, and Marty Furman, its Chief Operating Officer. Nakajima told Goh Pentel Japan would love Concept's idea and Pentel America finally would be able to move forward to launch HyperG.

Nakayama acknowledged Concept had come up with the smoothest line contest idea. When he asked who thought of this idea, Hawakawa pointed to Goh. Nakayama said: "'How can such a great idea [come] from a woman? Especially an Asian woman." He later asked Concept for additional digital artwork compositions and encouraged Concept to continue developing the idea.

When Furman asked Goh how Concept would be able to carry out such a large campaign, Goh replied Concept would use several vendors. Furman asked for the vendors' names and became insistent when Goh appeared reluctant to disclose their identities. Advertising agencies are protective of such information, because sometimes clients approach vendors directly in an attempt to get around the agencies. Goh relented and revealed Alloy Media as a potential vendor. She had to spell out "Alloy," because Furman could not understand her English.

Pentel America directed Concept to prepare a budget, because Pentel Japan was going to approve the smoothest line contest. At both the December 5 and December 7 presentations, Concept had proposed charging Pentel America monthly fees for advertising and public-relations, plus its 15 percent commission mentioned in the contract. Pentel America did not indicate those rates were unreasonable.

On December 14, 2007, Hayakawa presented to Pentel America Concept's proposed budget, totaling $360,000 a year. Furman sent Hayakawa an e-mail asking Concept to estimate the cost to broaden the campaign to more schools.

On December 20, 2007, Hayakawa presented Pentel America with a supplemental budget for the expanded campaign. Pentel America did not indicate the rates were unreasonable.

On January 7, 2008, Hayakawa sent an e-mail to Nakayama regarding Pentel's readiness to sign the commitment contract which would enable Concept to move forward with the campaign.

On January 8, 2008, Nakayama phoned Hayakawa to let him know Pentel Japan had given the go-ahead for the "smoothest line" contest campaign and that on January 11 Hayakawa was to go to Pentel America's headquarters for the commitment contract.

Prior to January 11, however, Pentel America decided not to hire Concept for the HyperG launch campaign. As of January 10, Pentel America already contacted Alloy Media and Reichesbaird, another vendor, regarding the "smoothest line" contest.

Prior to the January 11 meeting, Furman requested Hayakawa send him by e-mail electronic copies of all materials relating to the "smoothest line" contest. He did not tell him Pentel America would not be retaining Concept. Hayakawa complied with Furman's request, and Furman printed out the materials. At that juncture, no legitimate purpose would be served for that request, although it could be useful for pirating Concept's idea.

At the January 11, 2008 meeting, Hayakawa did not observe any printouts from the electronic files. Instead of discussing the requested files, Furman told Hayakawa that Pentel America's budget had been reduced and it could not proceed with the "smoothest line" campaign. When the shocked Hayakawa requested an explanation, Furman refused to give one. Nakayama confirmed Furman's statement without giving an explanation. He added Pentel America loved the "smoothest line" concept and would contact Concept as soon as it had the necessary budget.

Pentel America hired Alloy Media and Rieschebaird to execute the smoothest line contest campaign, which launched on August 1, 2008. At trial, Nakayama acknowledged Pentel America had no budget problem and explained he chose to conceal the truth because "that is a Japanese way of humbling yourself."

On January 14, 2008, in an attempt to salvage Concept's business relationship with Pentel America, Hayakawa sent an e-mail to Pentel America offering to finish one of the art "comps," i.e., ad layouts, for $25,000 and allow Pentel America to use it for a single exposure. Pentel America did not accept this offer and simply paid Concept $5,000 as its presentation fee.

About a year later, Hayakawa and Goh discovered Pentel America had misappropriated their "smoothest line" contest idea. Pentel America launched the HyperG using the very "smoothest line" campaign Concept had proposed. HyperG was suddenly a "cool" pen, not just another pen. The campaign was a success with college students and generated much social buzz about the HyperG pen. Concept, however, was not the one that received credit for its innovative idea.

2. *Procedural*

On December 31, 2009, Concept filed the underlying action.

On April 15, 2011, Concept filed its third amended complaint, which set forth eight causes of actions, respectively, for breach of written contract; promissory fraud;[3] constructive fraud; deceit; unjust enrichment; unfair business practices (Bus. & Prof. Code § 17200 et seq); intentional interference with prospective economic advantage; and negligent interference with prospective economic advantage. Pental America, Pentel Japan, Isseki Nakayama, Marty Furman, and Alloy Media, LLC. were named as defendants.

Prior to trial, Concept dismissed the following defendants: Issei Kakayama, Marty Furman, Alloy Media, LLC, Alloy Media + Marketing, and Riechesbard, Inc.[4]

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3 Although this cause of action is labeled "actual fraud," the allegations reflect the claim in fact is for promissory fraud. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.)

4 Alloy Media + Marketing and Riechesbard, Inc. were added as defendants after the third amended complaint was filed.

The trial was bifurcated. The initial phase consisted of a jury trial only on the causes of action for breach of written contract and promissory fraud. A jury trial was then conducted on punitive damages sought in connection with the fraud claim.

The jury returned a special verdict in favor of Concept on both causes of action. On the breach of contract claim, the jury found Concept and Pentel America entered into a contract; Concept did "all, or substantially all, of the significant things, that the contract required it to do"; "all conditions required by the contract for Pentel America's performance occur[red]"; Pentel America "fail[ed] to do something that the contract required it to do"; Concept was "harmed by that failure"; and Concept's "damages for the breach of the contract" is "$14,625,000[.]"

On the issue of punitive damages, the jury returned a special verdict in favor of Concept in the amount of "$5,000,000" against Pentel America and in the amount of "$12,500,000" against Pentel Japan.

On February 22, 2012, judgment was entered in favor of Concept based on the jury's special verdicts in the total amounts of $20,375,000 against Pentel America and $12,500,000 against Pentel Japan.

On March 26, 2012, the Pentel defendants filed a motion for new trial and a JNOV motion.

On April 20, 2012, following a hearing, the trial court denied the motion for new trial and denied in part and granted in part the JNOV motion.

On May 15, 2012, a formal order was filed which reflected: The trial court denied the motion for a new trial, finding "no errors in law to warrant a new trial in this action." As for the JNOV motion, the court granted it in part by striking the $750,000 fraud compensatory damage award as "an impermissible double recovery by [Concept]" and reduced the punitive damage against "against Pentel America to $1,70,000 and [to] $2,680,000 against Pentel Japan for a total punitive damage award of $3,750,000[.]" The court in all other respects denied the JNOV motion.

On June 1, 2012, an amended judgment was filed (Amended Judgment). The judgment, as amended, reflected the trial court's order on the new trial motion and the

JNOV motion and that, following a hearing on these motions, Concept elected the remedy of award on the breach of contract claim. The Amended Judgment provided Concept "shall recover $14,625,000 against defendants Pentel" America and Pentel Japan.

On June 1, 2012, a "Corrected Judgment Entered Nunc Pro Tunc as of June 1, 2012" document was filed as "Approved as to form" by the attorneys for Concept and for Pentel America.

On June 13, 2012, the Pentel defendants filed a notice of appeal as to the Amended Judgment and three other matters.

On June 21, 2012, the trial court made this nunc pro tunc order: "Due to inadvertence and clerical error, the AMENDED JUDGMENT of 6-1-2012 does not accurately reflect the order of the Court. . . . Said AMENDED JUDGMENT is hereby corrected nunc pro tunc as of 6-1-2012 as reflected in the 'CORRECTED JUDGMENT ENTERED NUNC PRO TUNC AS OF JUNE 1, 2012'."

Also on June 21, 2012, the trial court signed the document entitled "Corrected Judgment Entered Nunc Pro Tunc as of June 1, 2012" (Corrected Judgment). The Corrected Judgment reflects the judgment in the amount of $14,625,000 is only against Pentel America.

On July 6, 2012, Pentel America filed an amended notice of appeal from the Corrected Judgment.[5]

On July 24, 2012, following a hearing, the trial court granted Concept's motion for attorney fees and awarded $1,512,999.00, as "an appropriate award" against Pentel America.[6]

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5 As discussed in footnote 1, post, we dismiss the purported appeals from four other matters listed in the amended notice of appeal. In view of such dismissal, Pentel Japan, who purported to appeal from three of these matters, is no longer a party to this appeal.

6 The record reflects no reporter's transcript is available.

On August 10, 2012, Pentel America filed a notice of appeal from the award of attorney fees order.

DISCUSSION

1. *No Preemption Pursuant to Federal Copyright Act*

Pentel America contends the judgment must be reversed, because the federal statute on copyrights (17 U.S.C.A § 101 et seq.) covers Concept's advertising idea, and thus, a state claim based on unauthorized usage of such idea is preempted under federal law. We disagree.

a. *Nature of Concept's Advertising Idea*

The smoothest line advertising campaign was an idea conceived and developed by Concept, specifically Goh, pursuant to the 2007 contract between Concept and Pentel America for a specific purpose, namely, the launch of the HyperG pen. Paragraph 3 provides "[u]nless expressly provided in a separate written agreement, [Concept] is the owner of all intellectual property created under this agreement" and for this reason "use of such ideas, concepts or artwork by persons, vendors, printing companies, firms or others is expressly prohibited." The import of this provision is that Pentel America, the "client" for whom Concept came up with the idea, was prohibited from authorizing anyone, such as vendors, printing companies and firms, from using Concept's idea "[u]nless" such use is "expressly provided in a separate written agreement: between Concept and Pentel America. The last sentence of Paragraph 3 reads: "Works created for Client: If Client is interest in using any work of [Concept] created for Client in a different/new project/s, [Concept] is always open for fair trades and proposals." The significance of this sentence is to emphasize the point that the idea created by Concept pursuant to the contract was project specific. That the unauthorized use of Concept's idea is governed by the contract is evident from the sentence in Paragraph 3 addressing damages: "[E]ach unauthorized usage shall be a minimum of $10,000."

b. *Copyright Act Inapplicable to Pentel America's Breach of Contract Claim*

As of January 1, 1978, any legal or equitable rights covered under the Copyright

Act are subject to federal preemption.[7] Such preemption is inapplicable to "any rights or remedies under the common law or statutes of any State with respect to -- . . . subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression[.]" (17 U.S.C.A. § 301(b)(1).) "Material not subject to copyright" includes: "*Ideas*, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing[.]" (37 CFR § 202.1 (b), italics. add.) Moreover, "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." (17 U.S.C.A. § 102(b).)

In *Desny*, our Supreme Court clarified that the expression of an idea may be protected pursuant to a contract although copyright protection may be unavailable. The Court explained: "An idea is usually not regarded as property, because all sentient beings may conceive and evolve ideas throughout the gamut of their powers of cerebration and because our concept of property implies something which may be owned and possessed to the exclusion of all other persons." (*Desny*, *supra*, 46 Cal.2d 715, 731.) "[I]t is clear that California does not now accord individual property type protection to abstract ideas." (*Id*. at p. 732.) Moreover, "[n]either common law nor statutory copyright extends protection to an idea as such. '[O]nly in the expression' of a copyrighted work does any monopoly inhere; the "theme," the "plot," the "ideas" may always be freely borrowed.'

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7 The subject Copyright Act is the Copyright Act of 1976, which became effective January 1, 1978. (17 U.S.C.A § 101 et seq.; Pub.L. 94-553, Title I, § 101, Oct. 19, 1976; 90 Stat. 2541.) "On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State." (17 U.S.C.A. § 301(a).)

(Citation.)" (*Id*. at pp. 732-733.) Nonetheless, "[i] t is not essential to recovery that plaintiff's story or synopsis [i.e., expression of idea] possess the elements of copyright protectibility if the fact of consensual contract be found. (Citation.)" (*Id*. at p. 744.)

The court noted the applicable legal principles are set forth in the following quotation from Justice Traynor's dissent in *Stanley v. Columbia Broadcasting System* (1950[)] 35 Cal.2d 653, 674:"'The policy that precludes protection of an abstract idea by copyright does not prevent its protection by contract. Even though an idea is not property subject to exclusive ownership, its disclosure may be of substantial benefit to the person to whom it is disclosed. That disclosure may therefore be consideration for a promise to pay . [. . .] Even though the idea disclosed may be 'widely known and generally understood' (citation), it may be protected by an express contract providing that it will be paid for regardless of its lack of novelty.' (Citation.)" (*Desny, supra,* 46 Cal.2d at p. 733; see also, *Gunther-Wahl Productions, Inc. v. Mattel Inc* . (2002) 104 Cal.App.4th 27, 35-39, 42-43 [noting *Desny* also recognized implied-in-fact contract protection and finding prejudicial instructional error because "jury could easily interpret [its] language to require an express oral or written representation of compensation, which the law does not require for an implied contract"].)

In light of the above governing principles, we conclude that Concept's smoothest line campaign idea is not a matter covered under the Copyright Act and for this reason, there is no federal preemption of Concept's breach of contract claim arising from Pentel America's unauthorized use of Concept's idea.[8]

Concept's advertising idea was a campaign to market HyperG through a contest for prizes directed at college students with the theme of the contest to come up with the "smoothest line," meaning the best "pick up" line, which is a double entendre of the pen's claimed physical feature, i.e., making the "smoothest line." This is a mere "abstract idea," and thus, not subject to federal copyright protection. Nonetheless,

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8 Pentel America launched the HyperG pen by misappropriating Concept's smoothest line contest idea. It did not use Concept's ads illustrating that idea.

pursuant to *Desny*, Concept's idea, which had substantial value to Pentel America, is subject to protection against unauthorized usage by Pentel America through the subject express contract between Pentel America and Concept.

2. *"Asian Woman" Comment Not Reversible Error*

Pentel America contends the trial court committed reversible error by allowing evidence regarding a comment about an "Asian woman" because such evidence "served no function other than to paint Mr. Nakayama as a racist and sexist." While the trial court erred, the error was not prejudicial.

Pentel America made a motion in limine to exclude evidence of Nakamura's alleged comment that the smoothest line contest idea could not have been created by an Asian woman as highly prejudicial. In denying the motion, the trial court found such evidence was relevant to show surprise on the part of Pentel America that the idea had not been created previously.

At the later hearing for JNOV or a new trial, the trial court found "the way it was presented[,] there was no innuendo that it was "a sexually or racially motivated comment at all[,]" noting "it's usually men who think about pick-up lines and not women" and "this idea involves some subtleties in the English language," and the idea came from Goh, "someone whose English is a second language[.]"

The "Asian woman" comment was relevant to counter Pentel America's claim it had originated the "smoothest line" contest idea and to point to who did create that idea. Such comment, however, leads to a reasonable inference that Nakayama was both a racist and a sexist. As an initial matter, we conclude the trial court abused its discretion in admitting that comment, because its potential prejudicial impact outweighed its probative value. (Evid. Code § 352; *People v. Cole* (2004) 33 Cal.4th 1158, 1197 [prejudice under section 352 is "'evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues'"].)

On the other hand, we further conclude that admission of this comment did not give rise to the prejudice which would necessitate reversal of the judgment. "We can reverse a judgment based on the erroneous admission of evidence only if it is reasonably probable that the appellant would have obtained a more favorable result absent the error, so the error resulted in a miscarriage of justice. (Citations.) (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1415.) This is not the case here. The record contains overwhelming evidence from which the jury was entitled to find, which it did, that Goh of Concept was the idea's originator; Hayakawa explained Paragraph 3 to Nakayama prior to the existence of the contract; and Pentel America made unauthorized multiple uses of the idea. Accodingly, a result more favorable to Pentel America was not reasonably probable if the "Asian woman" comment had been excluded.

3. *Specialized Significance of "Usage" in Contract Justified Expert Testimony*

Pentel America contends the trial court erred in allowing expert testimony on the meaning of "usage" in paragraph 3 of the contract. No error occurred.

Paragraph 3 provides in pertinent part that "[t]he penalty for each unauthorized usage shall be a minimum of $10,000." Nowhere in the contract is the term "usage" defined or otherwise explained. The trial court allowed expert testimony on the customary meaning of the words "usage" and "use" in the advertising industry. The court reasoned "The jury needed to have some type of help. I certainly would have[.]"

A trial court's determination that expert testimony is admissible is reviewed for an abuse of discretion. (Citations.)" (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1168 (*Summers*).) "A ruling that constitutes an abuse of discretion has been described as one that is "'so irrational or arbitrary that no reasonable person could agree with it.' (Citation.)" (*Sargon, supra,* 55 Cal.4th 747, 773.) "'[T]he admissibility of expert opinion is a question of degree. The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission; if that were the test, little expert opinion testimony would ever be heard. Instead, . . . even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would 'assist' the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when 'the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness." [Citation.]' (Citation.)" (*Summers, supra*, at pp. 628-629.)

Additionally, "'[i]n the absence of technical words or phrases whose meanings are obscure, the office of interpretation belongs to the court. If the contract explains the meaning of the words, there is no need to go outside the contract. If, however, because of the use of technical or trade terms, the language is not plain, the testimony of those skilled in the art or experts in the field is admissible as to the meaning of the language. . . .' (Citation.)" (*Harrison v. Frye* (1957) 148 Cal.App.2d 626, 628.)

"Evidence of custom or standard practice is admissible to interpret the terms of a contract and to imply terms when no contrary intent is apparent from the other terms of the contract. (Citation.) Generally, when there is a custom in a certain industry, those engaged in that industry are deemed to have contracted in reference to that practice unless the contrary appears. (Citation.) The prevailing industry custom binds those engaged in the business even though there is no specific proof that the particular party to the litigation knew of the custom. (Citation.) The industry practice becomes a part of the contract, and the evidence of such custom is admissible to supply a missing term or to aid in interpretation if it does not alter or vary the terms of the contract. (Citation.)" (*Midwest Television, Inc. v. Scott, Lancaster, Mills & Atha, Inc.* (1988) 205 Cal.App.3d 442, 451.)

Pentel America notes "extrinsic evidence to explain the meaning of a written instrument" is admissible only where "the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonable susceptible." (*Pacific Gas & Elec. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37.) It contends the word "usage" in the contract is not reasonably susceptible to the meaning posited by Concept's expert, namely, "usage" means "media exposure," which, in turn, equates a "usage" as each poster and newspaper as well as each of the "1,000 Internet impressions in the HyperG campaign[.]" Rather, Pentel America urges, when "[c]onsidered in its non-technical and ordinary sense, and in light of the purpose of the Agreement, 'usage' clearly refers to [Concept's] ideas in a *marketing campaign*, not each individual 'media exposure' of the Smoothest Line Contest."

We are not persuaded. Under Pentel America's interpretation of "usage," Pentel America would owe Concept damages based on a single unauthorized use of Concept's smoothest line contest idea, namely, in launching its HyperG campaign. This interpretation of "usage" flies in the face of, and renders meaningless, the reference in Paragraph 3 to "*each* unauthorized usage" of an idea Concept created under the contract. In this instance, the trial court acted well within its discretion in allowing expert testimony on the meaning of "usage" in Paragraph 3 as that word is used in the advertising industry.

4. *Contract's Mutual Assent Element Established*

Pentel America contends the evidence was insufficient to establish the element of mutual assent, because it entered into the contract for the purpose of marketing the HyperG pen to the professional market and Concept's smoothest line contest was "directed toward the college market, which was not within the scope of the parties' Agreement." The record reflects the existence of mutual assent.

"Every contract requires mutual assent or consent (Civ. Code, §§ 1550, 1565), and ordinarily one who signs an instrument which on its face is a contract is deemed to assent to all its terms." (*Marin Storage & Trucking, Inc. v. Benco Contracting and Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1049.) "'Mutual consent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings.' (Citations.)" (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208.) "The parties' outward manifestations must show that the parties all agreed 'upon the same thing in the same sense.' (Civ. Code § 1580.)" (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811.)

"In order for acceptance of a proposal to result in the formation of a contract, the proposal 'must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain.' (Citation.) . . . The terms of a contract are reasonably certain if they provide a basis for determining...the existence of a breach and for giving an appropriate remedy." (Citation.)" (*Ibid*.)

"If application of the law to the facts is primarily factual in nature, the deferential substantial evidence standard applies; if application of the law to the facts is primarily legal in nature, the de novo standard applies. (Citation.)" (*Apex LLC v. Sharing World, Inc.* (2012) 206 Cal.App.4th 999, 1009.) "'[W]hether a certain or undisputed state of facts establishes a contract is one of law for the court...' [Citation.]" (*Robinson & Wilson, Inc. v. Stone* (1973) 35 Cal.App.3d 396, 407.) "Since this case involves a written agreement and the extrinsic facts relating to its construction are undisputed, we independently review the trial court's decision. (*PMC, Inc. v. Porthole Yachts, Ltd.* (1998) 65 Cal.App.4th 882, 887.)

Mindful of these principles, we conclude mutual assent existed. Pentel America approached Concept to come up with a successful idea to launch the HyperG pen. The contract described Concept's services as including "creative development and production, media planning and buying, research, direct marketing, planning and preparing point-of-sales, booklets, sales letter, product publicity and any similar promotional materials or services offered by [Concept] as may be required to fulfill requested advertising needs of [Pentel America]" regarding the subject project, namely, the advertising campaign to launch the HyperG pen. As discussed above, Paragraph 3 alerted Pentel America to the fact Concept was the owner of all intellectual property created under the contract, including "ideas," and admonished that "each unauthorized usage" by Pentel America would result in the payment of "a minimum of $10,000." Pentel America, through Nakayama, its President, executed the one-page contract.

At trial, Nakayama testified to his belief that the contract only pertained to Concept's services in creating a HyperG campaign directed solely to professionals. This unilateral belief does not give rise to lack of mutual consent. (*Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1587 [Mutual assent based upon "objective and outward manifestations of the parties; a party's 'subjective intent, or subjective consent . . . irrelevant'" (*Stewart*).) The evidence shows although Pentel America initially intended professionals to be the primary target of the HyperG campaign, it switched the target to college students based on Concept's evolving idea of the HyperG campaign. At no time did Pentel America thereafter instruct Concept to drop the resulting "smoothest line" HyperG contest campaign directed at college students. (See, e.g., *Stewart, supra, at* 1587 [no triable issue on question of mutual assent based on claimed lack of understanding of agreement before signing it.)

5. *Paragraph 3 Damages Provision Not Valid Liquidated Damages Provision*

Pentel America contends the Paragraph 3 damages provision is not a valid liquidated damages provision. We agree.

Paragraph 3 provides: "The penalty for each unauthorized usage [of Concept's idea] shall be a minimum of $10,000." The reference to "penalty" is not controlling. (See *Ridgley v. Topa Thrift & Loan Assn.* (1999) 17 Cal.4th 970, 979 ["no penalty in the sense of retribution for breach of an agreement" even though "word 'penalty' used"] (*Ridgley*).) Rather, "'[i]n evaluating the legality of a provision, a court must first determine its true function and operation.' (Citation.)" (*McGuire v. More-Gas Investments, LLC* (2013) 220 Cal.App.4th 512, 523 (*McGuire*).)

The record reflects the jury was not instructed to make a finding on whether Paragraph 3 provided for a penalty or liquidated damages, nor did the jury or the trial court make an express finding on this issue.[9] We initially conclude the trial court impliedly found Paragraph 3 provided for an enforceable liquidated damages by instructing the jury, on its own motion, that Concept "claims damages for [breach of contract] based upon paragraph three of the contract." We further conclude the court erred in making this finding.

"'Liquidated damages constitute a sum which a contracting party agrees to pay or a deposit which he agrees to forfeit for breach of some contractual obligation.' (Citation.) A liquidated damages provision in a contract 'normally stipulates a pre-estimate of damages in order that the parties may know with reasonable certainty the extent of liability for a breach of their contract.' (Citation.)" (*McGuire, supra*, 220

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9 The court did not give Pentel America's special instructions on the liquidated damages and unlawful penalty issue.

Cal.App.4th at p. 521.) "'A liquidated damages clause will generally be considered unreasonable, and hence unenforceable under section 1671(b), if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach. The amount set as liquidated damages "must represent the result of a *reasonable endeavor* by the parties to estimate a fair average compensation for any loss that may be sustained." [Citation.]" (*Ridgley, supra*, 17 Cal.4th at p. 977.) "'In short, "[a]n amount disproportionate to the anticipated damages is termed a 'penalty.' A contractual provision imposing a 'penalty' is ineffective, and the wronged party can collect only the actual damages sustained."' (Citations.)" (*Id*. at pp. 977-978.)

At one time, "[t]he general rule in this state [was] that a contract which undertakes to fix the amount of damages in anticipation of a breach of an obligation is void to that extent (Civil Code, § 1670) except 'when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.' (Civil Code, § 1671.) Accordingly, it is held that a party relying on a liquidated damage clause in a contract must plead and prove the facts validating his right to recover such predetermined amount. (Citations.)" (*Olson v. Biola Coop. Raisin Growers Assn.* (1949) 33 Cal.2d 664, 668.)

In 1977, however, the Legislature amended section 1671 of the Civil Code.[10] (Stats. 1977, ch. 198, p. 718, § 5, operative July 1, 1978.) Deleted is the above quoted language from the former section 1671 allowing for a liquidated damage amount only "when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

Civil Code section 1671 presently provides: Other than a liquidated damage provision in certain contracts not at issue, "a provision in a contract liquidating the damages for the breach of the contract is valid *unless* the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made." (§ 1671, subd. (b), italics added; see also, *Ridgley, supra*, 17 Cal.4th at p. 977.)

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10 All further section references are to the Civil Code unless otherwise indicated.

According to the Law Revision Commission Comments, "Section 1671 is amended to provide in subdivision (b) a new general rule favoring the enforcement of liquidated damages provisions except against a consumer in a consumer case." (Cal. Law Revision Com. com., 9 West's Ann. Civ. Code (2011 ed.) foll. § 1671, p. 138 (*LRCC*); see also, *Brian W. v. Superior Court* (1978) 20 Cal.3d 618, 623 [explanatory comments by law revision commission "persuasive evidence of the intent of the Legislature in subsequently enacting its recommendations into law"].)

"Subdivision (b) provides that a reasonable liquidated damages provision is valid[,]" and "where subdivision (b) applies, the burden of proof on the issue of reasonableness is on the party seeking to invalidate the liquidated damages provision. The subdivision limits the circumstances that may be taken into account in the determination of reasonableness to those in existence 'at the time the contract was made.' The validity of the liquidated damages provision depends upon its reasonableness at the time the contract was made and not as it appears in retrospect. Accordingly, the amount of damages actually suffered has no bearing on the validity of the liquidated damages provision. (*Ibid*.)

Moreover, "subdivision (b) gives the parties considerable leeway in determining the damages for breach. All the circumstances existing at the time of the making of the contract are considered, including the relationship that the damages provided in the contract bear to the range of harm that reasonably could be anticipated at the time of the making of the contract. Other relevant considerations in the determination of whether the amount of liquidated damages is so high or so low as to be unreasonable include, but are not limited to, such matters as the relative equality of the bargaining power of the parties, whether the parties were represented by lawyers at the time the contract was made, the anticipation of the parties that proof of actual damages would be costly or inconvenient, the difficulty of proving causation and foreseeability, and whether the liquidated damages provision is included in a form contract." (*LRCC*, *supra*, at p. 139.)

No mutual assent existed regarding the Paragraph 3 damages provision: "[E]ach unauthorized usage [of Concept's idea] shall be a minimum of $10,000." The term "minimum of $10,000" is nowhere defined or described in the contract itself. The parties to the contract were left without any clear cut amount or formula that would enable them to know with reasonable certainty how much Pentel America would be liable for each unauthorized use of Concept's idea. Accordingly, the trial court therefore erred in finding this provision was an enforceable liquidated damages provision. The judgment must be reversed and remanded for a new trial on actual damages, because the award of the jury was based on this unenforceable damages provision.[11]

6. *Attorney Fee Award Reversal and Remand Mandated*

Pentel America contends the 1.5 million attorney fee award must be reduced, because the award impermissibly includes fees attributable to the fraud claim and those incurred regarding defendants dismissed prior to trial. It also contends the award must be further reduced by 30 percent, because the amount awarded is unsupported by Concept counsel's block billing records, which are vague and belatedly created. We need not, and therefore, do not address these contentions.

The award of attorney fees is premature in view of the remand for a new trial on damages. We therefore reverse the post-judgment order awarding attorney fees and direct the trial court, on remand, to vacate the award and, following entry of the new judgment, make a new single award in light of the totality of the circumstances.

DISPOSITION

The jury's $14.625 million award of breach of contract damages for Pentel America's unauthorized usage of Concept's advertising idea is reversed, and the matter is remanded only for a new trial on actual damages. In all other respects, the judgment is affirmed. The attorney fees award order is reversed, and the matter remanded with directions to the trial court to vacate the award and, following entry of the new judgment,

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11 This disposition obviates the need to address Pentel America's related contentions that the trial court erred in refusing to grant its motion for summary adjudication that the Paragraph 3 damages provision is an unlawful penalty; the court erred in instructing the jury to determine damages based on this provision; the jury's $14.625 million damages award is infirm, because it does not mirror the calculations of Concept's experts; and the damages award should be reduced to $10,000 as an alternative to JNOV or a new trial.

make a new single award in light of the totality of the circumstances. Each party shall bear its own costs on appeal.

WOODS, Acting P. J.

ZELON, J., Concurring.

I concur in the result, and agree that the judgment should be reversed and the matter remanded. I write separately with respect to the analysis of the liquidated damages provision, concluding that that the evidence in this record establishes that the clause in question is an unenforceable penalty provision, and that the matter must be returned for a jury determination of actual damages.

At trial, Concept sought to recover $244,853,540 based on the testimony of its experts concerning the number of unauthorized usages multiplied by the $10,000 per usage figure contained in paragraph 3 of the agreement between the parties. Pentel asserts that the range of damages represented by that calculation was neither reasonable under the circumstances of the making of the contract, nor proportional to any actual damages that could have been anticipated. The evidence supports that conclusion.

1. The Test for an Enforceable Liquidated Damages Provision

Our Supreme Court has clearly defined the difference between a liquidated damages clause, enforceable under Civil Code section 1671[1], and a penalty which operates as a contractual forfeiture. (*Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970, 976-978 (*Ridgley*). Section 1671, as amended in 1977, provides that in commercial contracts such a clause will be enforced "unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made." (§ 1671, subd. (b).)

Under *Ridgley*, a liquidated damages clause will be found unreasonable and unenforceable if it: "bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach"; and is not "the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that might be sustained." (*Id*. at p. 977; quoting *Garrett v. Coast & Southern Fed. Sav. & Loan Assn.* (1973) 9 Cal.3d 731, 739.) An agreed-to amount disproportionate to any

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1 All further statutory references, unless otherwise noted, are to the Civil Code.

actual damages is deemed an unenforceable penalty, leaving the parties to prove actual damages; "the characteristic feature of a penalty is its lack of proportional relation to the damages which may actually flow from failure to perform under a contract." (*Ibid*.; see also *Harbor Island Holdings v. Kim* (2003) 107 Cal.App.4th 790, 797 [the showing of a lack of a proportional relationship between the amount sought at trial and the actual damages suffered is demonstrative of a penalty provision].)

The determination whether a provision is enforceable as liquidated damages or unenforceable as a penalty is an issue of law, subject to de novo review. (*McGuire v. More-Gas Investments, LLC* (2013) 220 Cal.App.4th 512, 523.) This is primarily a judicial determination for the trial court, which we review independently, unless the determination turns on the credibility of extrinsic evidence. (*Ibid*.) Because in this case the plaintiff's evidence, taken as fully credible, is sufficient to make this determination, we are not bound by the apparent construction placed on the clause by the trial court.[2]

2. The Testimony Establishes A Penalty, Not A Valid Liquidated Damages Provision

The critical testimony is that of Mr. Hayakawa, the principal witness for the plaintiff concerning the formation of the contract. Even without any consideration of the testimony by Mr. Nakayama, the principal for Pentel, the record demonstrates both that the parties made no effort to estimate what a fair compensation for the loss that might be casual by a breach would be, and that the amount sought under the clause, approximately one quarter of a billion dollars, bore no reasonable relationship to the range of damages the parties could have anticipated.

2 As the majority points out, the trial court did not formally rule, but did instruct the jury to apply the formula, thus apparently indicating a conclusion that it was an enforceable liquidated damages provision.

Mr. Hayakawa testified that the contract at issue was a standard form, prepared by his counsel, that he had used fifty to one hundred times. It was the same contract he had used in a transaction with Pentel three years earlier. He testified that the provision establishing a penalty of $10,000 per use was the same number he had used for that transaction in 2004; although in 2007 he was using a $30,000 per use figure for other clients, in recognition of the prior business relationship, and as a gesture of goodwill, he maintained the lower figure for Pentel.

When asked about his conversations with Mr. Nakayama on the date the contract was presented to Pentel, he responded that he explained the terms, and asked Mr. Nakayama not to steal the idea; Mr. Nakayama said he would not. Mr. Hayakawa identified no discussion between the parties concerning the type or amount of damages that might accrue in the event of a breach. And, while he initially testified that the $10,000 number was based on the amounts that could have been earned from a good campaign, the value of the idea, and future business, he did not testify that he ever discussed this with Mr. Nakayama.[3]

Moreover, Mr. Hayakawa was explicit about the fact that he did not know if the provision was intended to be an actual approximation of his anticipated damages:

"Q: Do you believe paragraph 3[damages provision] was intended to actually, to be an actual approximation of your anticipated damages?

[Objections]

A: I don't know.

Q: You don't know if it was intended to be an actual approximation of your anticipated damages?

A: I don't know."

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3 While this testimony, including his belief that this contract would increase his future unrelated business seems inconsistent with his testimony that this was a form contract, with a lower number than he was currently using with other clients, taken at face value it nonetheless shows the lack of the required mutual reasonable endeavor by the parties. Mr. Nakayama testified that parties did not discuss the amount of the penalty at all.

Finally, Mr. Hayakawa testified that he understood the total budget for the campaign to be $1.5 million dollars over a five year period. His belief, had the campaign been carried out fully, was that Concept's profit would have been $400,000-$800,000. Mr. Nakyama testified that the total launch budget was $550,000.

In summary, this testimony demonstrates that neither the contract, nor the penalty provision, was prepared with this transaction, and its asserted game-changing benefits, in mind. In fact, it placed a lower value on the work than the other work being contracted for by Concept at the time it was entered. On this testimony, the amount set could as well have been $10,000, $20,000 or $30,000; there is no basis on which to find any relationship to the potential outcome of the transaction. In any event, Concept identified no effort on its part to approximate the range of damages, and the evidence demonstrates that the parties did not discuss what the range of potential damages might be. As a result, there can be no finding of a reasonable endeavor by the parties to estimate a fair average compensation, as the law requires.

With respect to the second factor, a reasonable relationship to the anticipated actual damages, the testimony of the parties was within the same range-$400,000 on the low end, and $1,500,000 on the high end.[4] Using the highest end of that range for comparison, the damages sought by imposing the contractual formula are more than 163 times higher than any anticipated profit; using Mr. Hayakawa's maximum of $800,000 profit, it is more than 300 times higher.[5] No case establishes that as a reasonable relationship; it is not.

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4 Using the $1,500,000 figure attributes all of the budget to payments to Concept, which may overestimate their anticipated return.

5 I agree with the majority that, on its face, this provision is not a formula at all, as it set a minimum amount, but no maximum. However, in light of the fact that both parties treated it as a $10,000 amount, it is reasonable to review the clause as if it had been written as a fixed amount.

Because the record before this court establishes that paragraph 3 is unreasonable, it is a penalty as a matter of law and cannot be enforced as a valid liquidated damages clause. As a result, the matter must be remanded for Concept to present proof of its actual damages.

ZELON, J.

SEGAL, J.,* Concurring.

I concur in the result and agree with the analysis of the liquidated damages provision in Justice Zelon's concurring opinion. I write separately because, although I agree with Justice Woods that expert testimony regarding the meaning of words such as "usage" in the custom and practice of the relevant industry is generally admissible to prove a meaning to which ambiguous language in a contract is reasonably susceptible (see *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1117, 1126-1127; *Varni Bros. Corp. v. Wine World, Inc.* (1995) 35 Cal.App.4th 880, 889), I would not reach that issue in this appeal. Because the liquidated damages provision is unenforceable, expert testimony on the meaning of terms in that provision is no longer relevant.

SEGAL, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.